IN THE SUPREME COURT OF MISSOURI

No. 83837

State of Missouri *ex rel.*

ANNA L. NICKELS,

Petitioner-Relator,

vs.

HONORABLE DAVID LEE VINCENT, III,
and **HONORABLE FRANK CONLEY**,
Respondents.

RELATOR'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Relator incorporates by reference her previous jurisdictional statement.

STATEMENT OF FACTS

Although a Statement of Facts is intended to be a neutral recitation, Respondents have used their Statement to make arguments, *e.g.*, at page 16, and to "object" to an affidavit in the record before this Court. Relator respectfully points out there is no basis in the record for concluding any part of Judge Vincent's ruling on May 18, 2001, was a "clerical error" as Respondents have provided no citation of any authority which mandates a formal hearing before a motion is ruled on.

REPLY POINTS RELIED ON

REPLY POINT I.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating all of Relator's claims which were dismissed because Relator stated multiple claims against Defendant Lifemark Hospitals of Missouri, Inc. ("Lifemark"), upon which relief could be granted, in that under the standards of *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. 1993) (en banc): (a) In Count III Relator sufficiently pled the elements of a claim against Lifemark

under the theory of corporate negligence, which is a theory of recovery that might be adopted in the underlying case, and (b) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for "ordinary" vicarious liability arising out of the negligent acts or omissions of its agents, servants and employees under the theories of negligence and a lost chance of recovery, and (c) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for vicarious liability arising out of the negligent acts or omissions of two physicians alleged to be the ostensible or apparent agents of Lifemark, under the theories of negligence and a lost chance of recovery.

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993) (en banc)

State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901 (Mo. 1996) (en banc)

State ex rel. Bernero v. McQuillin, 152 S.W. 347 (1912) (en banc)

Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851 (Mo. 1993) (en banc)

Mo. R. Civ. P. 94.04

Mo. R. Civ. P. 97.04

REPLY POINT II.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating all of Relator's claims which were dismissed because the various Defendants in the underlying suit who sought dismissal or transfer for pretensive joinder/improper venue failed to meet their burden of proof and persuasion that the record, pleadings and facts presented in support of the motions asserting pretensive joinder established that there is, in fact, no cause of action against Lifemark and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against Lifemark in that: (a) Judge Vincent stated he would not consider any matters outside the Petition without first giving notice to the parties and giving Relator an opportunity to respond, and since no such notice was given, any consideration of matters outside the Petition would constitute a violation of Relator's due process rights under the Fourteenth Amendment to the Constitution of the United States and under Article I, §10 of the Constitution of Missouri to notice

and a meaningful opportunity to be heard before their claims against Lifemark can be dismissed with prejudice and the case transferred to Boone County, and (b) even if considered, the matters outside the Petition which were submitted to Judge Vincent were insufficient to establish that all five claims against Lifemark were invalid, in part because the Brocksmith affidavit contained inadmissible hearsay; the Poehling affidavit constituted inadmissible hearsay, and the Mueller affidavit merely certified the accuracy of the photocopying of Miss Nickels' hospital records, and (c) the movants offered no evidence to demonstrate that the state of knowledge of Relator and her counsel at the time the Petition was filed was such that the information would not support a reasonable legal opinion that a case could be made against Lifemark, particularly in view of the allegations of a new theory of recovery proposed to be adopted in the underlying case.

Baker v. Biancavalla, 961 S.W.2d 123 (W.D. Mo. App. 1998)

City of Chesterfield v. Deshetler Homes, Inc., 938 S.W.2d 671 (E.D. Mo. App. 1997)

Taylor v. Seaman, 932 S.W.2d 912 (W.D. Mo. App. 1996)

Rule 81.12(e)

Rule 55.27(a)(6)

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U.S. Const., Amd. 14

Mo. Const., Art. I, §10

Rules

Mo. R. Civ. P. 81.12(e)

Mo. R. Civ. P. Rule 55.27(a) and (a)(6)

REPLY ARGUMENT

REPLY POINT I.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating all of Relator's claims which were dismissed because Relator stated multiple claims against Defendant Lifemark Hospitals of Missouri, Inc. ("Lifemark"), upon which relief could be granted in that under the standards of *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. 1993) (en banc): (a) In Count III Relator sufficiently pled the elements of a claim against Lifemark under the theory of corporate negligence, which is a theory of recovery that might be adopted in the underlying case, and (b) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for "ordinary" vicarious liability arising out of the negligent acts or omissions of its agents, servants and employees under the theories of negligence and a lost chance of recovery, and (c) in Counts I and II Relator sufficiently pled the elements of a claim against Lifemark for vicarious liability arising out of the negligent acts or omissions of two physicians al-

leged to be the ostensible or apparent agents of Lifemark, under the theories of negligence and a lost chance of recovery.

Section 1. Standard of Review

Ms. Nickels incorporates by reference her prior statement of the standard of review.

Section 2. Respondents' "Failure to State a Claim" Argument

Respondents' argument that Ms. Nickels' Petition for a Writ in this Court fails to state a claim primarily relies on cases which involved questions of trial court pleadings, and on rules concerning trial court pleadings, *e.g.*, Rule 55.05. Respondents never mention or discuss the pleading requirements of the Rules governing applications for remedial writs.

Rule 94.04 specifies in pertinent part:

> The petition in mandamus shall contain a statement of the facts, the relief sought, and a statement of the reasons why the writ should issue. A copy of any order, opinion, record or part thereof, or other thing which may be essential to an understanding of the matters set forth in the petition in mandamus shall be attached as exhibits if not set forth therein. The petition in mandamus *shall* be accompanied by suggestions in support thereof. [Emphasis added.]

With the exception of the use of "prohibition" for "mandamus," Rule 97.04 is identical to Rule 94.04.

The combination of the petition for a writ and the mandatory accompanying suggestions is what must be reviewed to determine whether a claim for relief has been stated. The petition here contains the requisite statement of facts, the relief being sought and the reasons for issuing a writ, all of which make clear that the central issue is whether Respondent Judge David Lee Vincent, III ("Judge Vincent"), properly decided the issue of pretensive joinder. The Suggestions in Support cited *State ex rel. Cross v. Anderson*, 878 S.W.2d 35 (Mo. 1994) (en banc), (prohibition is appropriate to prevent a trial court from enforcing an order transferring a case), and cited the cases of *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 and 904 (Mo. 1996) (en banc) and *State ex rel. Malone v. Mummert*, 889 S.W.2d 822 (Mo. 1994) (en banc) (mandamus is appropriate to compel transfer back to the original county).

Nothing in the Rules mandates the use of certain "buzz words" as a condition precedent to issuance of a writ, particularly when, as here, the irreparable harm is so patently obvious: if the order transferring venue is wrong, without use of a remedial writ, the plaintiff would be compelled to undergo trial in a court without authority to hear the case, followed by an unnecessary appeal. Under the standards of *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993) (en banc), Ms. Nick-

els has more than adequately stated a claim that Judge Vincent exceeded his jurisdiction by improperly ordering the transfer of the underlying case to Boone County.

Section 3. Respondents' "Jurisdiction to Commit Error" Argument

Respondents appear to argue that Judge Vincent's decision to transfer was discretionary, and therefore a remedial writ is inappropriate because there was no "abuse of discretion."

Respondents have not cited one case which holds in a writ proceeding involving the correctness of a pretensive joinder/transfer ruling, the standard of review is "abuse of discretion." *Breckenridge*, *Malone* and *Cross* are ample evidence that abuse of discretion is not the standard by which this Court determines whether there was pretensive joinder. In fact, appellate courts appear to conduct *de novo* reviews in pretensive joinder cases, similar to the standards for summary judgment appeals, although no case has been found articulating that principle.

Respondents also argue Judge Vincent had "jurisdiction to commit error." If extended to its logical conclusion, that argument would result in dismantling the appellate court system, because every trial court decision would be discretionary and not reviewable by appeal or writ. This Court clearly has the power to utilize the same information that was before Judge Vincent to decide whether Judge Vincent properly or improperly transferred the underlying case to Boone County.

Section 4. Respondents' "Adequate Remedy by Appeal" Argument

This Court said in *State ex rel. Bernero v. McQuillin*, 152 S.W. 347, 351 (1912) (en banc):

> Has the court, complained of, jurisdiction to do what it is about to do? It matters little whether it is in fault in proceeding without any jurisdiction at all, or (as put in some cases) in excess of its jurisdiction; the writ will go in either event. So, in a given case, though the court has general jurisdiction of that class of cases, if it is about to do in that case some particular important thing which it has no judicial power to do, the writ has been allowed.

Ms. Nickels obviously agrees with the general principle that where there is an adequate remedy by appeal or otherwise, a remedial writ is not appropriate, but even though Respondents assert the existence of "numerous other remedies" in fact Ms. Nickels has no remedy except to seek a writ.

Respondents cite *Coon v. Dryden*, 46 S.W.3d 81 (W.D. Mo. App. 2001), to support their argument that the May 18th judgment was merely an interlocutory order which can be changed at any time prior to a final judgment. The difference between *Coon* and this case is that in *Coon* a single judge had control of the entire suit. That judge entered an order in 1997, modified it several years later, and on appeal the Western District affirmed his power to do so. *Id.* at 88. Respondents cite no authority to support their implicit argument that Judge Vincent could modify

or set aside his May 18th ruling after Respondent Judge Frank Conley ("Judge Conley") had assumed control of the case. No authority was cited holding Judge Conley has the power to set aside Judge Vincent's order, deprive himself of jurisdiction, and transfer it back to St. Louis County. No authority was citing holding that a pretensive joinder/transfer ruling is an "interlocutory" order susceptible to post-transfer modification.

Respondents complain that Ms. Nickels did not ask Judge Vincent or Judge Conley to reconsider the May 18th ruling. Respondents fail to explain how Judge Vincent could have been asked, given the speed with which the certified copy of the file was sent to Boone County. Nor do Respondents cite any authority holding that a motion to reconsider before the transferring judge or the transferee judge is a condition precedent to seeking a writ.

Respondents cite no authority holding that filing a motion to amend is a condition precedent to seeking a writ, nor do they explain how a motion to amend could have been ruled on by Judge Vincent given the speed with which the certified copy of the file was sent to Boone County.

A remedy is something which solves a problem. A writ proceeding decides once and for all whether the transfer decision was correct. The "remedies" suggested by Respondents (motions to reconsider, to amend, etc.) actually decide nothing on a permanent basis, since each so-called "remedy" leaves available the

option or necessity for one of the parties to seek a writ.

There only adequate remedy for an erroneous pretensive joinder/transfer decision is a writ. If the decision to transfer is wrong, then the plaintiff would be compelled to go through discovery and trial in a court which legally had no power to act in the case, followed by an appeal, followed by a return to the original court to start all over again. It is a far better use of judicial resources to "pause" the trial court proceedings and seek a resolution by writ of the question of the proper venue for the underlying case than to potentially waste time and money for the parties, and judicial resources for the trial court, if the transfer decision was wrong.

Section 5. Respondents' "Corporate Negligence" Argument

This Court expressly held in *Nazeri*, *supra*, that if a petition alleges facts which "meet the elements....of a cause that might be adopted in that case," the petition survives a motion to dismiss for failure to state a claim. There isn't any "gray" in that ruling. So long as Ms. Nickels at a minimum stated the elements of the corporate negligence claim against Lifemark—as she did—the motion to dismiss should have been denied.

Regardless of whether this Court adopts the theory of corporate negligence in this case, nothing in the law requires that a plaintiff must be *successful* in persuading a trial court or an appellate court to adopt a new theory of recovery in order to withstand a motion to dismiss for failure to state a claim. All that *Nazeri* re-

quires is that the elements of the claim be pleaded.

Respondents argue Ms. Nickels failed to state a claim for corporate negligence against Lifemark because she did not allege a breach of the duty to select and retain only competent physicians. Respondents cite no authority holding that in order to successfully plead corporate negligence a plaintiff must plead a breach of all four duties under that doctrine.

Miss Nickels pleaded a breach of three duties: (1) adequate equipment; (2) rules and regulations and (3) adequate supervision. [Rel. Writ Ex. A, Rel. Pet., Vol. 2 at 76-77.] That is all she was required to do.

Paragraph 6 of Count III alleges the breach of three of the four listed non-delegable duties: the duty of safe and adequate facilities and equipment (¶ 6(a)); the duty to oversee those who practice medicine in the hospital (¶ 6(d), ¶ 6(f)), and the duty to adopt and enforce adequate rules and polices (¶ 6(b), ¶ 6(c), ¶ 6(e)).

Respondents argue Ms. Nickels "failed" to "allege any facts in her Petition for Damages, showing why the four corporate negligence duties should be imposed on Defendant Lifemark," but did not cite any authority holding that when pleading a new theory of recovery the petition must contain "facts" which show why the theory should be adopted. A similar complaint is made about Ms. Nickels' opening brief. Yet under *Nazeri*, *supra*, the issue is not whether a plaintiff is successful in obtaining trial court or appellate court approval of the new theory, but whether the

elements of the theory were pled.

Ms. Nickels and her counsel of course have no way of knowing why this Court issued its preliminary writ, and whether the Court views this case in part as a means of resolving the issue of whether this theory should be adopted in Missouri. Relator's counsel obviously believes this theory should be adopted, or it would not have been pled in the first place. The reason for its adoption is a simple one: hospitals have evolved far beyond being merely facilities where others practice medicine; they have become major providers of health care services, and when they fail to provide adequate equipment to meet patients' needs; when appropriate rules and regulations could prevent harm to patients; when failure to ensure the competency of the physicians it hires or the physicians it authorizes to use its facilities and its technological and human resources, could result in harm to patients, and when failure to supervise the practice of medicine within its walls can lead to harm, it is past time to recognize that hospitals are directly engaged in the business of providing health care services and therefore should have direct liability for the consequences of their actions or failures to act.

Although the facts in *Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851 (Mo. 1993) (en banc), have no relationship to the facts of the present case, in *Lough* this Court addressed the question of whether a new theory of recovery should be approved. This Court said at 854:

> The basic question in this case is whether a duty exists. Any question of duty depends upon a calculus of policy considerations. These include "the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; considerations of cost and ability to spread the risk of loss; the economic burden upon the actor and the community." [Citation omitted.] Foreseeability is the paramount factor in determining the existence of a duty, but a relationship between the parties where one is acting for the benefit of another also plays a role. [Citations omitted.]

There is certainly a social consensus that the health of patients in a hospital is worthy of protection. It is eminently foreseeable that defective equipment can result in physical or emotional harm to a patient, just as allowing an incompetent physician to practice in the hospital can harm a patient. It is common knowledge that hospitals and various departments and divisions within hospitals adopt rules and regulations governing the practice of medicine at the hospital. If, for example, a particular surgical procedure is dangerous if a woman is pregnant, and the hospital has no policy requiring a pregnancy test before a woman of child-bearing age undergoes that operation, it is eminently foreseeable that if a woman undergoes that procedure

and is unknowingly pregnant, the woman or child or fetus may be harmed or die. A simple precaution—a rule that says in essence "no pregnancy test, no surgery"—would eliminate the risk. There is no logical reason for the hospital to escape being held accountable for harm it could easily have prevented. As in premises liability cases, the landowner is not an insurer of the safety of invitees, but is nevertheless held accountable for failing to take steps to prevent foreseeable harm. Hospitals should not be insurers, either, but when hospitals are engaged, as they are, in the multi-million dollar business of providing health care services on an in-patient, out-patient or emergency basis, hospitals should be held liable for failing to take steps to prevent foreseeable harm.

Society certainly attaches moral blame to negligent health care providers who injure patients. Holding hospitals directly liable in certain respects for injuries to patients on their premises provides an incentive to hospitals to take steps to prevent future harm, just as ordinary premises liability law provides the same incentive for landowners. Hospitals are far better able to bear the losses associated with injuries to patients arising out of medical negligence, than most patients are ever likely to be.

Under the *Lough* standards, adoption of the theory of corporate negligence is appropriate, but even if this Court rejects the theory, Ms. Nickels pled the elements and under *Nazeri* there was, therefore, no basis for transfer. As this Court said in *Malone, supra*, at 825, citing Rule 55.03(b)(2), if the pleading meets the

standards of Rule 55.03, it is sufficient to withstand a motion to dismiss for failure to state a claim. The corporate negligence claim against Lifemark certainly meets the Rule 55.03 standards.

Section 6. Respondents' "Vicarious Liability" Argument

Respondents argue dismissal of the vicarious liability claim against Lifemark was appropriate because of a lack of "plausible causation" and because Lifemark employee negligence could not possibly have caused the damages identified in Paragraph 59 of Count I.

Respondents have cited no case holding that the pleading standard is "plausible" causation. Paragraph 56 of Count I specifically identifies damages suffered by Ms. Nickels as a result of the alleged negligence of hospital employees. It is common knowledge, for example, that bed sores (a form of a loss of skin integrity) result from pressure, when the body stays in one place too long in bed. Thus, Paragraph 56 pleads both negligence and resulting harm. The fact that the harm which Lifemark's employees caused to Ms. Nickels may be "less" than the harm caused by the medical negligence of other defendants is irrelevant. Respondents cite no authority holding that pleading "major" or "significant" harm is a condition precedent to withstanding a motion to dismiss for failure to state a claim. The law would unquestionably allow a jury to award a smaller amount of damages to Ms. Nickels for the negligence of Lifemark employees than it might award for the dam-

ages caused by the negligence of others. But whether ultimate damage awards are large or small has no bearing on pleading. Ms. Nickels pled the existence of a duty owed by Lifemark employees to her; she pled specific breaches of that duty, and she pled specific harm resulting from that duty. That is all that is needed to state a claim of vicarious liability against Lifemark.

Section 7. Respondents' "Ostensible Agency" Argument

Ms. Nickels incorporates by reference her argument in her opening brief.

Section 8. Summary and Conclusion

Under *Nazeri* Ms. Nickels has properly invoked this Court's remedial writ jurisdiction. The standard of review is not abuse of discretion, but is in essence *de novo*. Where the issue is an erroneous pretensive joinder/transfer ruling, a remedial writ is the only adequate remedy. Ms. Nickels met the requisite pleading standards for all of her claims against Lifemark. For the reasons stated previously as well as above, there was no pretensive joinder, and Judge Vincent exceeded his jurisdiction in transferring the underlying case to Boone County.

POINT II.

Relators are entitled to an order requiring Respondents to transfer the underlying case back to St. Louis County and reinstating all of Relator's claims which were dismissed because the various

Defendants in the underlying suit who sought dismissal or transfer for pretensive joinder/improper venue failed to meet their burden of proof and persuasion that the record, pleadings and facts presented in support of the motions asserting pretensive joinder established that there is, in fact, no cause of action against Lifemark and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against Lifemark in that: (a) Judge Vincent stated he would not consider any matters outside the Petition without first giving notice to the parties and giving Relator an opportunity to respond, and since no such notice was given, any consideration of matters outside the Petition would constitute a violation of Relator's due process rights under the Fourteenth Amendment to the Constitution of the United States and under Article I, §10 of the Constitution of Missouri to notice and a meaningful opportunity to be heard before their claims against Lifemark can be dismissed with prejudice and the case transferred to Boone County, and (b) even if considered, the matters outside the Petition which were submitted to Judge Vin-

cent were insufficient to establish that all five claims against Lifemark were invalid, in part because the Brocksmith affidavit contained inadmissible hearsay; the Poehling affidavit constituted inadmissible hearsay, and the Mueller affidavit merely certified the accuracy of the photocopying of Miss Nickels' hospital records, and (c) the movants offered no evidence to demonstrate that the state of knowledge of Relator and her counsel at the time the Petition was filed was such that the information would not support a reasonable legal opinion that a case could be made against Lifemark, particularly in view of the allegations of a new theory of recovery proposed to be adopted in the underlying case.

Section 1. Standard of Review

Relator incorporates by reference her prior statement of the standard of review.

Section 2. Reply Argument

Ms. Nickels agrees with the statement of black-letter law that in this state a constitutional issue must be raised at the earliest opportunity to preserve it for appellate review. Where Ms. Nickels and Respondents part ways is on the issue of

the earliest opportunity in *this* case. The earliest opportunity was in fact a writ proceeding, since no due process violation arises unless and until a court considers matters outside the pleadings which accompany a motion to dismiss for failure to state a claim, without giving the parties notice of the Court's intention to consider those non-pleading matters and provide the parties with an opportunity to respond.

A motion to dismiss for failure to state a claim was filed by Lifemark, accompanied by non-pleading attachments. Ms. Nickels did not respond to the non-pleading attachments. Rule 55.27(a) expressly states in pertinent part:

> If, on a motion...to dismiss for failure of the pleading to state a claim...matters outside the pleadings are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 74.04. All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04. [Emphasis added.]

Rule 55.27(a) provides the sole mechanism in this Court's Rules for a trial court to consider matters outside the pleadings which accompany a motion to dismiss for failure to state a claim. The plain language of the Rule compels conversion to a summary judgment proceeding if the trial court is going to consider the non-pleading matters, and the Rule mandates notice to the parties of the conversion. In *L.C. Development Company, Inc. v. Lincoln County*, 26 S.W.3d 336, 339 (E.D.

Mo. App. 2000), the Eastern District held that prior notice by the court to the parties is a prerequisite to conversion of the motion to one for summary judgment, citing *Baker v. Biancavalla*, 961 S.W.2d 123, 125 (W.D. Mo. App. 1998) (notice and a reasonable opportunity to be heard are required before conversion to summary judgment). Where there is no evidence in the record that a trial court notified the parties of an intent to consider matters outside the pleadings, an appellate court reviews a decision to dismiss solely on the basis of the pleadings. *City of Chesterfield v. Deshetler Homes, Inc.*, 938 S.W.2d 671, 673 (E.D. Mo. App. 1997). Even where a trial court's decision shows that the judge necessarily considered matters outside the pleadings, if neither notice and opportunity to be heard were provided to the parties under Rule 55.27(a), the trial court can not rely on matters outside the pleadings as a basis for its ruling, and neither can an appellate court, thus requiring reversal and remand. *Taylor v. Seaman*, 932 S.W.2d 912, 915 (W.D. Mo. App. 1996). It is only if the plaintiff waives the right to notice by expressly consenting to the conversion, or if the plaintiff himself attaches matters outside the pleadings to his response to the motion to dismiss, that notice is unnecessary. The record clearly demonstrates no express or implied waiver or consent to conversion here.

No one, including Judge Vincent, has denied that during the May 9, 2001, hearing, Judge Vincent stated to all counsel that he would not consider matters outside the pleadings unless he provided notice and an opportunity for Ms. Nickels to

respond to those non-pleading matters. Respondents now argue that the Court should not consider the affidavit of Sean Pickett reciting a fact which Respondents do not dispute is true, because the hearing was not recorded by audio tape or a court reporter. They cite *State ex rel. Grimes v. Appelquist*, 706 S.W.2d 526, 529 (S.D. Mo. App. 1986).

Grimes was a Springfield paternity suit in which the trial court ordered a blood test performed in Kansas City. The putative father argued in the writ proceeding that the trial court exceeded its jurisdiction because there was no proof that there was a more convenient location for the test. The mother's attorney submitted an affidavit saying the father refused to enter into an agreement to have blood drawn in Springfield and then shipped to Kansas City for testing, *i.e.*, an affidavit providing information about what was essentially a settlement negotiation on that issue. Inferentially, that fact was not known to the trial court, and the Southern District said it could not consider the affidavit on appeal. Here, however, Sean Pickett's affidavit is used as a mechanism to supplement an inadequate record, *i.e.*, to provide this Court with information about what in fact happened, not to provide information unknown to the trial court at the time of the events giving rise to this writ proceeding.

Rule 81.12(e) provides that "[i]f anything material is omitted from the record on appeal, the parties by stipulation, or the appellate court, on a proper suggestion

or of its own initiative, shall direct that the omission or misstatement be corrected." Although on its face Rule 81.12 applies only to appeals, Judge Vincent's commitment to notice and opportunity to be heard is clearly material to the issues here, and the fact he made such a commitment was omitted from the record, both due to the lack of recording of the hearing, and the omission of any reference to that commitment in the memorandum/docket entry Respondents have supplied at page A-18 of their Appendix.

Given the fact that Ms. Nickels' counsel is noted as having appeared by telephone for the May 9th hearing, and that there appear to be signatures on the memorandum/docket entry by four defense attorneys, the only reasonable inference to be drawn from the document is that it was prepared after the completion of the hearing and without participation by Sean Pickett. Logic alone suggests that since Mr. Pickett raised the issue of notice in the hearing, and Judge Vincent made the commitment to provide notice and an opportunity to respond, that had Mr. Pickett known of the memorandum/docket entry he would have ensured that it included that commitment.

By their silence, Respondents have implicitly stipulated to the accuracy of the Pickett affidavit with reference to Judge Vincent's commitment to notice. If Rule 81.12(e) is applicable to writ proceedings, it provides a mechanism for this Court to obtain confirmation from Judge Vincent that he in fact made such a commitment

during the May 9th hearing, although it is highly unlikely that at this stage of the proceedings he is going to deny it. If Rule 81.12(e) is not technically applicable here, then it would appear to be within the Court's inherent powers to have the authority necessary to obtain a complete record of what occurred before the trial court, at least with reference to matters that are material to the issues presented to the Court for decision.

Yet even without the Pickett affidavit, the duty to provide notice and an opportunity to be heard existed under Rule 55.27(a). Although Respondents claim that Ms. Nickels is "confusing" the notice requirement for conversion to a motion for summary judgment with consideration of non-pleading matters attached to a pretensive joinder motion to dismiss for failure to state a claim, there is actually no confusion at all.

A motion to dismiss for failure to state a claim was filed. That makes the motion a Rule 55.27(a)(6) motion. Non-pleading attachments accompanied the motion, and were relied on in the motion. That brings into play the last paragraph of Rule 55.27(a) concerning conversion to summary judgment.

Ms. Nickels agrees that under the second method for determining pretensive joinder, matters outside the pleading may be considered by the trial court, *e.g.*, *Hefner v. Dausmann*, 996 S.W.2d 660, 664 (S.D. Mo. App. 1999), although in *Hefner* the trial court specifically said in its ruling that it had considered matters

outside the pleadings. However, Rule 55.27(a) contains *no* exception for pretensive joinder motions, *i.e.*, no language which says that if a 55.27(a)(6) motion is based on pretensive joinder, then the trial court is free to consider matters outside the pleadings without notice to the parties. No case has been found holding that a 55.27(a)(6) pretensive joinder motion is not subject to the last paragraph of Rule 55.27(a), just as any other 55.27(a)(6) motion would be if accompanied by non-pleading matters.

Under the present state of the law, Rule 55.27(a) provides the exclusive mechanism by which a trial court may consider non-pleading matters which accompany a 55.27(a)(6) motion. Under that Rule, Ms. Nickels had no duty to respond to the non-pleading matters unless and until Judge Vincent provided notice to her he was going to consider those matters, and unless and until he provided her with an opportunity to be heard in response.

In reality, the second method for determining whether pretensive joinder has occurred is very much akin to, if not indistinguishable from, a summary judgment proceeding. The second method requires that movants concede that the petition states a claim upon which relief can be granted, but then the movants must prove that due to the non-pleading matters submitted to the trial court, the plaintiff could not make a submissible case against the resident defendant and that the plaintiff knew that at the time the petition was filed.

A defense motion for summary judgment says, "Because of facts A, B and C, plaintiff can not make a submissible case on her claim, and I am therefore entitled to judgment as a matter of law." A pretensive joinder motion, relying on the second method, says, "Because of facts A, B and C, plaintiff can not prove that there is, in fact, a cause of action against the resident defendant, and defendants are therefore entitled to dismissal of the claims against the resident defendant and transfer to another venue." It is respectfully suggested that if there is a distinction between the substance of Rule 55.27(a) and the standards for the second method of proving pretensive joinder, *e.g.*, *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525 (Mo. 1994) (en banc), it is a distinction without a difference.

Where there is no Rule or case law imposing a duty on Ms. Nickels to immediately respond to non-pleading matters accompanying a 55.27(a)(6) motion claiming pretensive joinder, Ms. Nickels justifiably relied on both the provisions of Rule 55.27(a) and Judge Vincent's commitment in not initially responding to the non-pleading matters. Where there is no duty to act, there can be no penalty for Ms. Nickels' request at the May 9th hearing for notice and an opportunity to respond if Judge Vincent was going to consider the non-pleading matters. Where there is no duty to act, the length of time between the filing of the non-pleading matters and the hearing and eventual ruling is completely irrelevant to any issue before this Court.

The only mechanism mentioned in the Rules for consideration of non-

pleading matters accompanying a 55.27(a)(6) motion is the last paragraph of Rule 55.27(a). Thus, the issue raised by Respondents concerning the relationship or applicability of the conversion-to-summary-judgment provisions of Rule 55.27(a) to pretensive joinder 55.27(a)(6) motions appears to be a question of first impression for this Court. Given the lack of any express decision on that issue, and the plain language of Rule 55.27(a), which contains no exceptions for pretensive joinder motions, if this Court were to rule for the first time that where the issue is pretensive joinder, a plaintiff has an immediate duty to respond to non-pleading matters accompanying a 55.27(a)(6) motion, then Ms. Nickels should be provided with an opportunity to do so, consistent with the requirements of due process.

Respondents argue that Judge Vincent could have relied on the Brocksmith affidavit as "evidence" to support dismissal of the claims against Lifemark under the second method. In doing so, Respondents ignore the case law requiring that affidavits be based on personal knowledge. For example, the Brocksmith affidavit demonstrates no personal knowledge on the part of Dr. Brocksmith: (a) of Ms. Nickels' state of mind and what she knew and when she knew it, or (b) whether Ms. Nickels ever saw the bills to which he refers, or (c) what forms Ms. Nickels did or did not sign. Respondents do not explain how a statement in a hospital form that some doctors *may* be independent contractors translates to *proof* that two particular doctors were not ostensible agents of the hospital. The affidavit provides no

basis for Dr. Brocksmith to conclude that loss of skin integrity due to pressure, *cf.*, Paragraph 56 of Count I, is not a reasonable and probable consequence of Lifemark employee negligence, nor any basis to conclude that emotional distress is not a foreseeable consequence if the device the hospital provides for a patient to call for help is not within reach of the patient. Even if Judge Vincent could properly have considered the Brocksmith affidavit, or even if this Court could do so, the affidavit provides no basis for a dismissal of Ms. Nickels' claims against Lifemark.

Under the case laws previously cited, the Poehling affidavit is inadmissible hearsay in its entirety, yet Respondents have chosen to ignore that law and simply reiterate (via paraphrase) the purported "evidence" in the affidavit as if silence and repetition will get them past the hearsay barrier. For the reasons previously stated, neither the Poehling affidavit nor the medical records affidavit can form a basis for a dismissal of any or all of Ms. Nickels' claims against Lifemark.

Respondents assert at page 59 of their brief that Judge Vincent "could have properly concluded that all of the aforementioned information...was available to Relator at the time she filed her lawsuit...." Respondents' problem is that there is nothing in the record to support the assertion. Except to the extent the petition itself demonstrates what was known at the time the suit was filed, Defendants did not offer a scintilla of evidence to sustain their burden of proving that Relator and her counsel knew at the time suit was filed that no submissible case could be made

against Lifemark. Respondents even go so far as to claim at page 60 of their brief that what Ms. Nickels' counsel "should have known" could be the basis for Judge Vincent's dismissal of the claims against Lifemark. Yet they cite no case which makes "should have known" a pretensive joinder standard under the second method.

Respondents argue this Court should not weigh the evidence. But that is precisely what a higher court does when it conducts what is essentially a *de novo* review of a trial court's actions. This is not a case where the abuse of discretion standard applies and the appellate court defers to the trial court's judgment if at all possible. This Court is examining the identical information that Judge Vincent had before him at the time of the May 18th ruling, and is thus equally capable of "weighing" the evidence and determining whether the dismissal for pretensive joinder and transfer to Boone County were proper.

Respondents' final argument, completely unsupported by citation to relevant authority, is yet another plea to this Court to do nothing at all except send the case back to Judge Conley, and then see what happens on the issue of venue if and when Dr. Danuser is served. *Washington University v. ASD Communications, Inc.*, 821 S.W.2d 895 (E.D. Mo. App. 1992) does say that one defendant may not waive venue for another. That holding has nothing to do with this case, however, since Ms. Nickels has not requested any defendant to waive venue, and no defendant has

done so, and any speculation about what Dr. Danuser might do can not be a basis for any decision by this Court.

Sending the case to Judge Conley and allowing him to proceed with discovery and trial, as well as allowing service of process to issue from Boone County to Dr. Danuser, would be tantamount to ruling in favor of Judge Vincent on all the issues in this writ proceeding—a fact of which Respondents can hardly claim to be unaware.

Judge Vincent made a commitment, which he has never denied, to provide notice and an opportunity for Ms. Nickels to respond, before he considered the non-pleading matters which accompanied the motion to dismiss for failure to state a claim. Even without that commitment, Judge Vincent had the same duty under Rule 55.27(a), since nothing in the record supports a conclusion that Ms. Nickels consented to conversion to a summary judgment proceeding, or that she waived her right to notice and an opportunity to respond. Nothing in the record supports a conclusion that Judge Vincent considered any matters outside the pleadings in ruling on the 55.27(a)(6) motion. Nothing in this record reveals any notice to Ms. Nickels that the matters outside the pleadings would be considered.

All of this brings the argument full circle to the constitutional question. In substance if not in form, on May 9th Judge Vincent committed himself to following Rule 55.27(a). If he based his decision on the non-pleading matters without the

requisite notice, he violated Ms. Nickels' right to due process under the Fourteenth Amendment to the Constitution of the United States and Article I, §10 of the Constitution of Missouri. Nothing in the record, however, suggests he considered those non-pleading matters, and thus there was no reason to raise the issue before him. Since Respondents are arguing that Judge Vincent could and did properly rely on the non-pleading matters in making his May 18th ruling, the earliest opportunity to raise the constitutional question was in the writ proceeding and it has therefore been properly preserved. If this Court rules, as it should, that Judge Vincent did not, and properly could not, rely on the non-pleading matters in making his May 18th ruling, and if this Court does not itself consider those non-pleading matters, as it should not, then the constitutional issue is moot.

CONCLUSION

For all the reasons stated above, as well as previously, a remedial writ should be granted requiring the transfer of the underlying case back to St. Louis County and the reinstatement of all of Plaintiff-Relator's claims against all parties, to the extent that any claim against any Defendant other than Lifemark may have been dismissed.

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CERTIFICATE OF SERVICE

One spiral-bound copy of the above and foregoing brief, and one copy on 3.5" diskette, have been mailed, postage prepaid, this 28th day of November, 2001, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify the following:

1. This brief is in compliance with the requirements of Mo. R. Civ. P. 55.03.

2. This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b).

3. This brief contains 7,493 words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This brief was prepared using Microsoft Word 97, and the word count was calculated by Word 97.

4. The file containing this brief, and the respective diskettes filed with the Court and/or served on the parties were scanned for viruses on 25 October 2001, using McAfee VirusScan 4, with virus definitions updated through 21 November 2001, the most recent date for which virus definitions were available, and the file and diskettes have been found to be virus-free.

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